

No. _____

In The
Supreme Court of Illinois

JOHN C. BAMBENEK, ADAM ANDRZEJEWSKI, and JOHN TILLMAN, citizens of the state
of Illinois

Plaintiffs

v.

MILORAD R. BLAGOJEVICH, in his official capacity as GOVERNOR of the State of Illinois

Defendant

**BRIEF IN SUPPORT OF COMPLAINT TO REMOVE GOVERNOR RODNEY R.
BLAGOJEVICH FROM OFFICE UNDER ARTICLE V, SECTION 6 OF THE ILLINOIS
CONSTITUTION**

Bruno Behrend
ATTORNEY AT LAW
823 Forest Avenue
River Forest, IL 60305

Counsel for Plaintiffs

JOHN C. BAMBENEK, ADAM
ANDRZEJEWSKI and JOHN TILLMAN

AN ORIGINAL PROCEEDING

POINTS AND AUTHORITIES

POINTS AND AUTHORITIES.....	1
INTRODUCTION	2
ISSUE PRESENTED	2
JURISDICTIONAL STATEMENT	2
STATEMENT OF FACTS	2
ARGUMENT.....	4
I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION AS THE ILLINOIS CONSTITUTION AND SUPREME COURT RULE 382 DO NOT SPECIFY WHO MAY BRING SUCH AN ACTION.....	4
Illinois Constitution, Article V, Sec. 6(b)	4
Illinois Constitution, Article V, Sec. 6(d)	4
5 ILCS 275/1.....	4
Supreme Court Rule 382.....	5
<i>People ex rel. Hartigan v. E & E Hauling, Inc.</i> , 153 Ill.2d 473, 482, 180 Ill.Dec. 271, 607 N.E.2d 165 (1992)	5
<i>Chicago Bar Association v. Illinois State Bd. of Elections</i> , 161 Ill. 2d 502; 641 N.E.2d 525; 204 Ill. Dec. 30 (1994).	6
Raymond G. Scachitti, v. UBS Financial Services, 831 N.E.2d 544, 215 Ill.2d 484 (2005)	6
II. THE GOVERNOR IS SUFFERING FROM AN “OTHER DISABILITY” AND THEREFORE MUST BE FOUND TO BE UNABLE TO SERVE IN HIS OFFICE.....	8
CONCLUSION	9
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE	11
APPENDIX.....	12

INTRODUCTION

This is an Original Proceeding pursuant to Article V, Sec. 6(d) of the Illinois Constitution, and Supreme Court Rule 382. Plaintiffs seek to have this Court declare that the Governor, Milorad “Rod” R. Blagojevich is unable to serve in the Office of Governor and to have him removed from office.

ISSUE PRESENTED

Whether Governor Blagojevich is unable to serve in the Office of Governor?

JURISDICTIONAL STATEMENT

This Court has original jurisdiction over this matter pursuant to Article V, Sec. 6(d) of the Illinois Constitution, and Supreme Court Rule 382.

STATEMENT OF FACTS

This is a case of original jurisdiction and therefore contains no trial record to attach or cite to. Attached to this Brief is a copy of the Criminal Complaint filed against Blagojevich in the United States District Court for the Northern District of Illinois. (App. p. 1.) One relevant page of the affidavit substantiating the Criminal Complaint is included in the Appendix (App., p. 3) and a copy of the full affidavit is available at http://cms.wgntv.com/images/blago_complaint.pdf.

Agents from the Federal Bureau of Investigation arrested Blagojevich on the morning of December 9, 2008. According to the Criminal Complaint which precipitated this arrest, signed by Daniel W. Cain, a Special Agent for the Federal Bureau of Investigation,¹ the

¹ Plaintiffs emphasize that neither Mr. Cain, nor any member of the federal government, was contacted in the preparation of this Action, nor has stated that they would testify. The Criminal Complaint, as a sworn public document, is merely referred to herein to illustrate the

arrest concerned, *inter alia*, attempting to sell the appointment of a United States Senator, and agreeing to sign bills passed by the General Assembly, and distribute public funds, under *quid pro quo* arrangements to financially benefit his personal interests. In summary the Criminal Complaint states:

From in or about 2002 to the present . . . defendants did, conspire with each other and with others to devise and participate in a scheme to defraud the State of Illinois and the people of the State of Illinois of the honest services of ROD R. BLAGOJEVICH and JOHN HARRIS, in furtherance of which the mails and interstate wire communications would be used . . .

Beginning no later than November 2008 to the present . . . defendants . . . being agents of the State of Illinois . . . corruptly solicited and demanded a thing of value, namely the firing of certain Chicago Tribune editorials members responsible for widely-circulated editorials critical of ROD R. BLAGOJEVICH, intending to be influenced and rewarded in connection with business and transactions of the State of Illinois . . . namely, the provision of millions of dollars in financial assistance by the State of Illinois

(App., p. 1.) Blagojevich also is alleged to have sought to auction-off the appointment of a United States Senator:

Intercepted phone calls demonstrate that ROD BLAGOJEVICH, JOHN HARRIS, and others have engaged and are engaged in efforts to obtain personal gain, including financial gain for the benefit of ROD BLAGOJEVICH and his family through the corrupt use of ROD BLAGOJEVICH's authority as Governor of the State of Illinois to fill the vacant United States Senate Seat previously held by the President-elect.

(Appendix, p. 3.)

Further, Illinois has just lost the ability to secure bonding because of the current political situation. Lt. Gov. Pat Quinn stated on December 11, 2008, that Blagojevich's criminal charges are affecting the state's bond rating: "Our state has been put on a credit

current situation of Blagojevich, and the impending probable indictment, criminal plea and/or trial and incarceration.

watch, a negative credit watch. We're borrowing \$1.4 million to help pay down the enormous debts Illinois has." (App., p. 4.)

Plaintiffs John C. Bambenek, Adam Andrzejewski, and John Tillman, are citizens of Illinois who pay state sales and income taxes and work in the state.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION AS THE ILLINOIS CONSTITUTION AND SUPREME COURT RULE 382 DO NOT SPECIFY WHO MAY BRING SUCH AN ACTION

Plaintiffs John C. Bambenek, Adam Andrzejewski, and John Tillman, in their capacity as citizens of Illinois, filed a motion that the Supreme Court of Illinois declare that Rod R. Blagojevich, Governor of the State of Illinois, lacks capacity to serve the State of Illinois or its citizens as Governor.

The Constitution of Illinois, in Article V, Section 6(b) states that;

If the Governor is unable to serve because of death, conviction on impeachment, failure to qualify, resignation or other disability, the office of Governor shall be filled by the officer next in line of succession for the remainder of the term or until the disability is removed.

The Illinois Constitution of Illinois, Article V, Section 6(d), states;

The General Assembly by law shall specify by whom and by what procedures the ability of the Governor to serve or to resume office may be questioned and determined. The Supreme Court shall have original and exclusive jurisdiction to review such a law and any such determination and, in the absence of such a law, shall make the determination under such rules as it may adopt.

Unfortunately, the General Assembly has not specified, through legislation, "by whom" nor what, if any, "procedures" are to be used to "question" or "determine" the fitness of the Governor.

The only guidance provided by the General Assembly comes through the "Emergency Interim Executive Succession Act," [5 ILCS 275/1] which does not address the current

situation. It appears that the legislature has not promulgated the necessary legislation under Article V, Sec. 6(d) of the Illinois Constitution. This leaves the matter to the Supreme Court of Illinois to decide, should the question arise, as it now has.

The Supreme Court has adopted Rule 382, which reads (in part);

Rule 382. Original Actions in the Supreme Court Pursuant to Article IV, Section 3, and Article V, Section 6(d), of the Constitution.

(a) Institution of proceedings. Proceedings in the Supreme Court when the court has original and exclusive jurisdiction under article IV, section 3, and article V, section 6(d), of the Constitution, which relate to redistricting of the General Assembly and to the ability of the Governor to serve or resume office, shall be instituted by filing a motion for leave to file a complaint, which motion shall be accompanied by the complaint and a brief in support of the motion. The complaint may be supported by affidavits or other pertinent documents.”

As may be seen, Rule 382 also provides no guidance as to whom may bring an original action under Article V, Sec. 6(d).

Plaintiffs have standing to file this motion and complaint. This Court has stated that, “The standing doctrine assures that issues are presented to a court only by parties who have a sufficient stake in the outcome of the controversy.” *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill.2d 473, 482, 180 Ill.Dec. 271, 607 N.E.2d 165 (1992). A party lacking an interest in the controversy has no standing to sue. *Id.*

Plaintiffs here, (John Bambenek, et. al.) as citizens of Illinois, and like every other Illinois Citizen, currently suffer from residing in a state where their Governor lacks capacity to act effectively in their interest. As noted above, the one of the most damaging factors in this state of affairs is that they lack representation in the U.S. Senate in what many would argue are trying times. Further, given the state of enmity between the Governor and other members of Illinois political leadership, any other actions taken by the Governor are likely to

be blocked and/or ignored (to any extent possible) by the Legislature. The state's citizens are suffering financially with every day that goes by and the Governor cannot perform in his Office. There is no possible argument that Plaintiffs do not have a "stake in the outcome" of having a Governor capable of executing his duties.

It may be argued that the Attorney General is the only officer that has standing to bring a case of this nature. Plaintiffs disagree. This court, in various cases has held that citizen and taxpayer standing does exist under various sets of facts. For example, the court has held that;

As a preliminary matter, there is no question that the Proponents, as citizens and taxpayers, have standing to bring their circuit court action against the named State defendants pursuant to the disbursement of public moneys statute. That statute expressly authorizes any citizen and taxpayer to bring an action to restrain and enjoin the disbursement of public funds by any officer or officers of the State (735 ILCS 5/11-301 *et seq.* (West 1992)).

Chicago Bar Association v. Illinois State Bd. of Elections, 161 Ill. 2d 502; 641 N.E.2d 525; 204 Ill. Dec. 30 (1994).

Here, there is no express statute allowing standing, *but there is nothing barring standing either*. Plaintiffs recognize that some cases indicate that the only the Attorney General has the power to bring a case of this nature. The court has held, for example, that:

In *Lyons*, we also examined *Briceland*, 65 Ill.2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149. In *Briceland*, this court held that "the Attorney General is the sole officer authorized to represent the People of this State in any litigation in which the People of the State are the real party in interest." (Emphasis added.) *Lyons*, 201 Ill.2d at 536, 269 Ill.Dec. 374, 780 N.E.2d 1098, quoting *Briceland*, 65 Ill.2d at 500, 3 Ill.Dec. 739, 359 N.E.2d 149. We also observed in *Lyons* that on the same day *Briceland* was decided, "this court also held in *Fuchs* [*v. Bidwill*, 65 Ill.2d 503 [3 Ill.Dec. 748, 359 N.E.2d 158] (1976)], that the Attorney General 'is the only officer empowered to represent the State in litigation in which it is the real party in interest.' *Fuchs*, 65 Ill.2d at 510 [3 Ill.Dec. 748, 359 N.E.2d 158]." (Emphasis added.) *Lyons*, 201 Ill.2d at 537, 269 Ill.Dec. 374, 780 N.E.2d 1098."

Raymond G. Scachitti, v. UBS Financial Services, 831 N.E.2d 544, 215 Ill.2d 484 (2005).

In this case, the Attorney General is not the proper party to be bringing suit, and even if she can, that right is no more hers than any other citizen's. This is most importantly the case because the Attorney General is obligated to *defend* the Governor, as a state official, if a suit is brought against him. That is why this Brief is being served on both the Governor *and* the Attorney General.

Additionally, Plaintiffs ask the court to take judicial notice of the fact that in this situation, the Attorney General has a perceived conflict of interest. The Court should take notice that, in this particular situation regarding the Governor, the Attorney General, along with other Constitutional officers and members of the General Assembly are clearly operating in their own interests, even if also in the interests of their Constituents.

Specifically, every elected official in the state can be expected to maneuver in some manner or another, as an elected political official, to affect a desired outcome in their interest, whether it pertains to the appointment to the U.S. Senate or the upcoming statewide elections in 2010.

It is for this reason that the Plaintiffs ask this court to specifically find that individual citizens of the state, as well as organizations and other entities, absent any legislation to the contrary, have standing to bring original cases to this court in this fact pattern.

Here, the Citizens should be allowed standing to act in their best interests without having to endure the political calculations of interested parties, particularly absent any specific input from the General Assembly under this scenario.

II. THE GOVERNOR IS SUFFERING FROM AN “OTHER DISABILITY” AND THEREFORE MUST BE FOUND TO BE UNABLE TO SERVE IN HIS OFFICE

Under Article V, Section 6(b) the Governor can be unable to serve “because of death, conviction on impeachment, failure to qualify, resignation or other disability.” “Other disability” is not otherwise defined. The common sense understanding of “other disability,” when placed in the quoted sentence, however, is that if an individual is unable to carry out the duties of his office, then he would be under a “disability.” This also would be its meaning under the legal maxim of *noscitur a sociis*.

Because of the criminal proceeding, Blagojevich will very likely be unable to carry out, at least until the proceeding is over, his duties as Governor. Plaintiffs, and the other citizens of Illinois, will therefore be damaged through the Governor not managing the day-to-day responsibilities of his Office.

The circumstances of the recent election of Illinois Senator Barack Obama, combined with the incapacity of the Governor to appoint a successor, create a situation where Illinois citizens are deprived of representation in the Senate.

In one of numerous scenarios, the citizens of Illinois are in an untenable situation regarding their representation in both State and federal governance. One very recent news item (for purposes of an example) shows that the US House of Representatives has passed a “bail-out bill” for the US automakers. This bill moved on the Senate, where it was filibustered. In this fight, Illinois citizens were deprived of the opportunity to have a full state vote on this crucial issue, as they are on every issue being addressed by the Senate at this time. Regardless of one’s view of the policy implications of each and every issue, the citizens of Illinois deserve full representation in the U.S. Senate.

Further, the fact that the Lieutenant Governor has stated that Illinois' bond rating has been jeopardized by the criminal proceeding illustrates the financial impact that the coming indictment, trial and/or plea, and incarceration will have upon the State as long as Blagojevich remains in office.

With this being the case, this Court, through Article V, Sec. 6(d), has the power to remove Blagojevich from office and allow the normal line of succession to proceed, and the acting Governor to serve the interests of Illinois Citizens. If and when Blagojevich is found innocent, or the charges are dropped by federal authorities, then Blagojevich can retake the Office.

CONCLUSION

For the forgoing reasons, Plaintiffs have standing to bring this original action, and this Court must find Milorad "Rod" R. Blagojevich unable to serve in the Office of Governor of the State of Illinois, and order that he be removed.

Respectfully submitted,

JOHN BAMBENEK, et al.,

Plaintiffs,

By: _____
One of their Attorneys

BRUNO BEHREND
Attorney at Law
823 Forrest Ave.
River Forrest, Illinois 60305
ARDC No. 6205385

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is ____ pages. As this is an original proceeding, there is no record to be placed in an appendix.

BRUNO BEHREND

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN SUPPORT OF COMPLAINT TO REMOVE GOVERNOR MILORAD R. BLAGOJEVICH FROM OFFICE UNDER ARTICLE V, SECTION 6 OF THE ILLINOIS CONSTITUTION was filed with the Clerk of the Court this ____th day of December, 2008. I further certify that three copies of the foregoing Brief were served this day via first-class mail, postage prepaid upon each of the following:

Lisa Madigan
Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601

Rod Blagojevich
Governor of Illinois
207 State House
Springfield, IL 62706

BRUNO BEHREND

APPENDIX

APPENDIX TABLE OF CONTENTS

Criminal Complaint filed against Blagojevich in the United States District Court for the Northern District of Illinois.	1
Page 54 of the Criminal Complaint.	3
ABC Chicago December 11, 2008 Story “Gov. Remains Silent for 2d Day”	4

UNITED STATES DISTRICT COURT

NORTHERN

DISTRICT OF

ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA

UNDER SEAL

V.

CRIMINAL COMPLAINT

ROD R. BLAGOJEVICH, and
JOHN HARRIS

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief.

Count One

From in or about 2002 to the present, in Cook County, in the Northern District of Illinois, defendants did, conspire with each other and with others to devise and participate in a scheme to defraud the State of Illinois and the people of the State of Illinois of the honest services of ROD R. BLAGOJEVICH and JOHN HARRIS, in furtherance of which the mails and interstate wire communications would be used, in violation of Title 18, United States Code, Sections 1341, 1343, and 1346; all in violation of Title 18 United States Code, Section 1349.

Count Two

Beginning no later than November 2008 to the present, in Cook County, in the Northern District of Illinois, defendants ROD R. BLAGOJEVICH and JOHN HARRIS, being agents of the State of Illinois, a State government which during a one-year period, beginning January 1, 2008 and continuing to the present, received federal benefits in excess of \$10,000, corruptly solicited and demanded a thing of value, namely, the firing of certain Chicago Tribune editorial members responsible for widely-circulated editorials critical of ROD R. BLAGOJEVICH, intending to be influenced and rewarded in connection with business and transactions of the State of Illinois involving a thing of value of \$5,000 or more, namely, the provision of millions of dollars in financial assistance by the State of Illinois, including through the Illinois Finance Authority, an agency of the State of Illinois, to the Tribune Company involving the Wrigley Field baseball stadium; in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2.

I further state that I am a Special Agent of the Federal Bureau of Investigation and that this complaint is based on the following facts:

SEE ATTACHED AFFIDAVIT

Continued on the attached sheet and made a part hereof: X Yes No

Daniel W. Cain, Special Agent
Federal Bureau of Investigation

Sworn to before me and subscribed in my presence,

December 7, 2008
Date

at

Chicago, Illinois
City and State

MICHAEL T. MASON, United States Magistrate Judge
Name & Title of Judicial Officer

Signature of Judicial Officer

contained in the newspaper article. ROD BLAGOJEVICH stated “what’s the deal? So, do McCormick stays at the Tribune, huh?” HARRIS stated “we haven’t heard that he’s gone, so.” ROD BLAGOJEVICH stated “I mean, those layoffs were minor (the December 4, 2008 Tribune layoffs).” HARRIS stated “well, I know they got a lot to do.” ROD BLAGOJEVICH asked “there’s still more coming?” HARRIS responded “yeah, they got a lot of cuts to make.” ROD BLAGOJEVICH stated “okay, at some point we should talk to [Tribune Financial Advisor] again, right?” HARRIS confirmed they should talk to Tribune Financial Advisor again.

4. Evidence Concerning Efforts to Obtain Personal Benefits for ROD BLAGOJEVICH in Return for his Appointment of a United States Senator

86. Intercepted phone calls demonstrate that ROD BLAGOJEVICH, JOHN HARRIS, and others have engaged and are engaged in efforts to obtain personal gain, including financial gain, for the benefit of ROD BLAGOJEVICH and his family through the corrupt use of ROD BLAGOJEVICH’s authority as Governor of the State of Illinois to fill the vacant United States Senate Seat previously held by the President-elect.

87. By law, after the President-elect’s resignation of his position as a U.S. Senator, which was effective on November 16, 2008, ROD BLAGOJEVICH has sole authority to appoint his replacement for the two years remaining of the President-elect’s Senate term. *See* 10 ILCS 5/25-8. During the course of this investigation, agents have intercepted a series of communications regarding the efforts of ROD BLAGOJEVICH, JOHN HARRIS, and others

[From
<http://abclocal.go.com/wls/story?section=news/local&id=6551421&pt=print>]

Local 

Gov. remains silent for 2nd day

Thursday, December 11, 2008 | 11:03 PM

Chicago Tribune subpoenaed



CHICAGO (WLS) -- Blagojevich spent most of his day again at work inside the Thompson Center as calls for him to resign get louder by the day.

Governor Rod Blagojevich remained silent on Thursday. While Blagojevich did not make any public comments, ABC7 spoke to his spokesman.

"I can tell you his mood today in the office. He was upbeat, positive. I think he is trying to impart that for the staff and to let people know that we have to keep continuing to do our jobs regardless of what's going on around here," said Lucio Guerrero, spokesperson.

The sentiments of Illinois citizens appear to be quite different. A recent poll shows that the governor has only an 8 percent approval rating and that 70 percent of those polled want the governor to resign.

Governor Blagojevich's day

Governor Blagojevich, along with his wife and children, left their Ravenswood home on Thursday morning without making any comments.

For a second day, the governor has avoided talking to reporters near his home or at work. His spokesman says he has spent the day at the Thompson Center, working on the state budget.

It's been two days since the feds accused Blagojevich of trying to sell off Barack Obama's empty senate seat.

According to Lt. Gov. Pat Quinn - who held a news conference in Springfield on Thursday - the governor's criminal charges are affecting the state's financial status, like its bond rating. And because of that, Quinn, among others, is again asking the governor to step down.

"Our state has been put on a credit watch, a negative credit watch. We're borrowing \$1.4 million to help pay down the enormous debts Illinois has," said Quinn.

The potential fiscal crisis may add a new twist in a political drama that is unfolding before the nation. The lieutenant governor said Illinois citizens must be the priority.

"When you in public life at a statewide level have no confidence from the people in a democracy there is no where else to go but resign or step aside," said Quinn.